Spurlino Materials, LLC; or Spurlino Materials of Indianapolis, LLC; or both as a single employer *and* Coal, Ice, Building Material, Supply Drivers, Riggers, Heavy Haulers, Warehousemen and Helpers, Local Union No. 716, a/w Internationaln Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers of America. Case 25–CA–031565

December 6, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On March 15, 2011, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and Charging Party each filed an answering brief, and the Respondent filed a reply brief. Additionally, the Acting General Counsel filed limited cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions, and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Spurlino Materials, LLC and Spurlino Materials of Indianapolis, LLC (a single employer), Indianapolis, Indiana, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(b).

"(b) Make the unfair labor practice strikers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision as amended in this decision."

Kimberly R. Sorg-Graves, Esq., for the General Counsel.
James H. Hanson, Esq. and *A. Jack Finklea, Esq. (Scopelitis, Garvin, Light, Hanson & Feary, P.C.),* for the Respondents.
Geoffrey S. Lohman, Esq. and *Neil E. Gath, Esq. (Fillenworth, Dennerline, Groth & Towe),* for the Charging Party.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that Spurlino Materials, LLC (SM) or Spurlino Materials of Indianapolis, LLC (SMI), or both as a single integrated enterprise, violated Section 8(a)(3) and (1) of the Act by refusing to immediately reinstate employees who engaged in a 9-day strike in early August 2010. The General Counsel contends that the employees were entitled to immediate reinstatement to their former positions, displacing if necessary any permanent replacements, because the strike was an unfair labor practice strike that was caused by SM's and/or SMI's failure to reinstate a prominent union supporter who was unlawfully discharged in February 2007.[1]

[1] Because we adopt the judge's finding that Spurlino Materials, LLC (SM) and Spurlino Materials of Indianapolis, LLC (SMI) constitute a single employer, we find it unnecessary to pass on the judge's ruling that SM was not collaterally estopped from presenting evidence contesting its status as an employer of the unit employees. However, we agree with the judge that SM's admission in a prior Board proceeding that it was the employer of the unit employees, is a relevant consideration in determining the interrelation of operations between SM and SMI.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the factor of interrelation of operations weighs in favor of single-employer status, we find it unnecessary to rely—as did the judge—on the fact that SM and SMI have a "common general business purpose."

Member Hayes notes that the Respondent does not seek to overrule extant Board precedent holding that unfair labor practices need only be a factor motivating employees to strike, not the sole or predominant factor, in determining whether a strike is an unfair labor practice strike. See, e.g., *RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1633 (2001), enfd. 281 F.3d 442 (4th Cir. 2002); *R & H Coal Co.*, 309 NLRB 28, 28 (1992), enfd. 16 F.3d 410 (4th Cir. 1994). Because the Acting General Counsel has shown that unremedied unfair labor practices remained a concern of employees, at the time of the strike, and were a factor in their decision to strike, Member Hayes accordingly joins his colleagues in adopting the judge's finding that the Respondent's employees engaged in an unfair labor practice strike.

[3] We modify the judge's remedy to provide that the unfair labor practice strikers shall be made whole for their losses, if any, from August 12, 2010, to the date they receive valid offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010), enf. denied on other grounds sub nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). We shall also modify the judge's recommended Order to conform to the remedy as amended herein.

For the reasons stated in his dissent in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

[1] The charge was filed on August 13, and the complaint issued on November 5, 2010. The complaint originally named only SM as the Respondent, but was amended on January 5, 2011, to allege that the term "Respondent" referred "to Spurlino Materials, LLC; and in the alternative to Spurlino Materials of Indianapolis, LLC; and in the alternative to Spurlino Materials, LLC and Spurlino Materials of Indianapolis, LLC, a single integrated enterprise" (GC Exh. 1(q)). The caption was subsequently amended at the hearing consistent with this allegation and FRCP 10(a).

SM and SMI deny that there was any legal duty to displace the permanent replacements and immediately reinstate the strikers at the conclusion of the strike. They contend that the strike was actually an economic strike in support of the employees' contract demands. They further contend that it was an unprotected partial strike because it excluded a particular jobsite that was covered by a project labor agreement. Finally, they also deny the "single employer" allegations, contending that SMI is the sole employer of the employees.

Following a prehearing conference, the case was tried before me on January 11–14 and February 3, 2011, in Indianapolis, Indiana.[2] Thereafter, the General Counsel, the Charging Party, and the Respondents filed posthearing briefs. Based on the briefs and the entire record,[3] including my observation of the demeanor of the witnesses,[4] for the reasons set forth below I find that SM and SMI are a single employer and that they violated the Act as alleged.

FINDINGS OF FACT

I. JURISDICTION

SM and SMI are limited liability companies with offices in Ohio and Indiana, respectively. Both supply and deliver ready mix concrete. SM and SMI admit, and I find, that each has purchased and received over $50,000 in goods from directly outside their respective states during the past 12 months, and that each is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. SM and SMI also admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE COMPLAINT ALLEGATIONS

A. Background

As indicated above, both SM and SMI are engaged in the business of supplying and delivering ready mix concrete to construction sites. SM was formed first, in 2000, and SMI in late 2005. Each was formed as an Ohio limited liability company (LLC), with a principal office in Ohio and the same designated manager, James Spurlino. At all relevant times, Spurlino has also been the majority owner and president of both companies. (GC Exhs. 43, 45; Tr. 6–7, 336, 364–370, 383–385, 464–468, 476–478, 563–565.)

As its name suggests, however, SMI actually operates primarily in and around Indianapolis, Indiana, approximately a 2-hour drive from SM's facility in Middletown, Ohio. SMI also has its own, onsite operations manager, Jeff Davidson. (Tr. 54–55, 333, 463–469, 567.) Further, unlike SM's employees, SMI's employees are represented. Pursuant to an election, the Union was certified as the exclusive bargaining representative of the drivers and plant operators/batch men at SMI in January 2006, a few months after SMI commenced operations.

SMI and the Union began negotiating their first collective-bargaining agreement shortly after the Union was certified. However, the negotiations proved unsuccessful; although the parties continued to meet and bargain through August 2009, the date of their last negotiating session, they failed to reach any agreement (Tr. 21, 87–89, 145, 185, 594, 618; R. Exh. 10).[5] The only contract that has covered the unit employees' terms and conditions of employment during the relevant period is a project labor agreement (PLA) for the stadium and convention center expansion project in downtown Indianapolis, to which both SMI and the Union are signatory, and which applies only to work performed on the project (Jt. Exhs. 2, 3; Tr. 621, 663).

During this period, the Union also filed a series of unfair labor practice charges. The first of these charges, relating to vacation pay and other employee benefits such as coffee and a breakroom, was resolved pursuant to a settlement (Tr. 89–91, 135–140, 205–206, 625). The second series of charges (Cases 25-CA-30053, et al.) were filed beginning in August 2006 and alleged several violations of Section 8(a)(1), (3), and (5) of the Act, including the 8(a)(3) discharge of one of the Union's most prominent supporters, Gary Stevenson, in February 2007. Following an investigation, the General Counsel issued complaints on these charges in March and July 2007. However, notwithstanding that the 2006 certification had named SMI as the employer, the complaints named SM as the respondent employer of the employees, and SM's answers admitted that it was their employer.

Following a hearing, in December 2007, Administrative Law Judge Ira Sandron issued a decision finding that SM did, in fact, commit most of the alleged violations, including the unlawful discharge of Stevenson.[6] Approximately a year later, in

[2] By agreement of all parties, I held the last, relatively short February 3 session by videoconference from an NLRB resident office in Region 12.

[3] In the absence of any objection, the transcript is corrected as set forth in my February 17, 2011 Notice to Show Cause (ALJ Exh. 1).

[4] Where the record revealed substantial differences between witnesses as to significant matters, I have specifically addressed them. As for other, less important differences or matters, the reader may infer that I credited the testimony cited, to the extent it supports my factual findings, and discredited contrary testimony. In making my credibility findings, I considered, as appropriate, not only the demeanor of the witnesses, but their apparent interests, if any, in the proceeding, and whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts. I have also considered "inherent probabilities, 'and reasonable inferences which may be drawn from the record as a whole.'" *Daikichi Corp*., 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003) (unpub.), quoting *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996). See also *NLRB v. Cutting, Inc*., 701 F.2d 659, 663 (7th Cir. 1983).

[5] The attorneys for the Union and SMI met one later time, around February 2010; however, they met without the parties' bargaining representatives, and the purpose of the meeting was just to make a list of open issues. (Tr. 89–90, 133, 135–142.)

[6] In the meantime, the General Counsel, on behalf of the Board, petitioned the Federal district court for a temporary injunction under Section 10(j) of the Act. The court issued the requested injunction in November 2007, which was affirmed by the Seventh Circuit in October 2008. The injunction ordered SM to cease and desist from committing unfair labor practices pending the Board's final decision in the cases. However, the injunction did not require the immediate reinstatement of Stevenson, apparently because the petition did not request any affirmative interim relief. See *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491 (7th Cir. 2008), affirming 2007 WL 3334786 (S.D. Ind., Nov. 8, 2007).

March 2009, a two-member Board affirmed the decision in substantial part, including the findings and recommended remedial order regarding Stevenson.[7] Specifically, the Board ordered SM, within 14 days, to offer Stevenson "full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed." It also required SM to make him whole for any lost earnings and benefits, with interest. *Spurlino Materials, LLC*, 353 NLRB 1198.

SM and the General Counsel subsequently filed cross-applications for review and enforcement of the Board's decision and order with the Seventh Circuit. Thereafter, around September 2009, at the direction of the court, the parties entered into settlement discussions. However, like the earlier negotiations over a contract, the settlement discussions over the unfair labor practices failed to bear fruit. Accordingly, beginning March 30, 2010, the parties began filing their appellate briefs in accordance with the court's briefing schedule. (Tr. 92, 123–124, 146).

In the meantime, however, in June 2010, the Supreme Court issued its opinion in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that the two-member Board lacked authority to issue decisions. In light of the Supreme Court's opinion, on July 8, 2010, the Seventh Circuit remanded the Stevenson case back to the Board. *NLRB v. Spurlino Materials,* 2010 WL 4069478.

Approximately a month later, on August 9, 2010, a newly constituted three-member Board panel issued another decision reaffirming the prior, March 2009 decision and order. *Spurlino Materials, LLC*, 355 NLRB 409. The case is now back before the Seventh Circuit for review and enforcement (Case No. 10-3049, oral argument held January 11, 2011).

B. The Strike

In March 2010, unit employees began calling the Union's president, Jim Cahill, to inquire about what was going on with the unfair labor practice case and the contract negotiations. According to Cahill, the employees seemed "frustrated about everything." He therefore decided to call a union meeting to update the employees and to take a vote on whether to engage in an unfair labor practice (ULP) strike (Tr. 146–147, 162–165, 183).[8]

The meeting was held on May 13 at the union hall in Indianapolis. About 13 unit employees attended (Tr. 97, 148, 204, 251; R. Exh. 14). After brief opening remarks, the meeting was turned over to the Union's attorney in the unfair labor practice cases, Geoffrey Lohman. Lohman gave an update on the status of those cases. He told them about the recent unsuccessful attempt to negotiate a resolution at the Seventh Circuit. He also gave them an estimate of how long the litigation might continue. He noted in this regard that neither the Board nor the Union had yet filed their briefs to the court; that it would take some time for the court to issue a decision; that there could be additional appeals from that decision, including possibly seeking review by the Supreme Court; and that there could be additional delay to determine the backpay owed. In sum, he told them it might "still take years to get the matter fully litigated and concluded." (Tr. 99–100, 149, 251.)

Lohman then took questions from the employees. A number of questions were asked about various issues, including the pending Seventh Circuit case, the earlier case that was settled involving vacation pay, coffee, and the breakroom, and a grievance. There was also at least one question about the status of the contract negotiations. Lohman therefore gave an update on that as well. He described what had occurred at the last bargaining session in August 2009, which he had attended with Cahill and the employee representatives, and what the open issues were. He advised the employees that the Union was still waiting for a response on those issues from the Company. (Tr. 87, 100–102, 116–117, 122, 149, 187, 205–207, 232.)[9]

Some of the employees also made statements that they needed to do something to get the Company to comply with the Board's order and resume contract negotiations (Tr. 149). After responding to questions, Lohman therefore discussed the possibility of engaging in a strike. He explained the difference between a ULP strike and an economic strike and the legal ramifications of each. Specifically, he told them that the Company would be legally obligated to reinstate them on request if the strike was ultimately determined to be a ULP strike, but not if it was an economic strike and the company had hired replacements. He advised them that the Union was therefore recommending that, if there was going to be a strike, it be a ULP strike; that the Company's unfair labor practices be the reason for the strike. (Tr. 100–101, 124–125, 150, 169, 205–206, 228–231, 252, 265.) He further advised them that they should have a defined goal. It was therefore recommended that getting Gary Stevenson reinstated be the immediate goal of a ULP strike. (Tr. 171–174, 194–195, 205–206, 215, 263.)

The issue was then put to a vote, i.e. whether the employees wanted to engage in a ULP strike. The employees were each given a secret ballot, which they could check "YES" or "NO" and place in a ballot box at the front of the room. The votes were unanimous in favor. (Tr. 102, 150–152, 163, 169, 208, 252; R. Exh. 14.)

Following the vote, Lohman and Cahill emphasized to the employees the importance of doing everything correctly; that, because it was not an economic strike, there were certain rules they needed to follow to make sure they did not lose their jobs (Tr. 129, 205–206, 209; R. Exh. 14). Cahill also addressed when the strike would occur. He explained to them that they

[7] Sec. 3(a) of the Act (29 U.S.C. Sec. 153(a)) provides that "the Board shall consist of five . . . members, appointed by the President by and with the advice and consent of the Senate." However, the Board's complement fell to two after the terms of the other members expired in December 2007, and was not restored to three or more until April 2010.

[8] To the extent there is any conflict in the record about whether the Union planned in advance to take a ULP-strike vote at the meeting, I find that it did. Employee Mooney testified that he was told by the union steward (Bales), who had been enlisted by Cahill to notify employees of the meeting, that they were going to discuss striking at the meeting (Tr. 164, 220). Further, Cahill admittedly brought strike ballots and generic ULP-strike picket signs to the meeting, and suggested that the employees take a ULP-strike vote during the meeting (Tr. 165–169). See also employee Poindexter's testimony (Tr. 251–252, 263).

[9] There is no record evidence of any complaint or finding that the Company has negotiated in bad faith.

could not go on strike the next day because the Company was sure to find out about the union meeting and be ready for the strike. He also noted that a strike at that time would have less impact because the weather was bad and work was sporadic. He said he would let the employees know when the time was right (Tr. 102, 129, 151–152, 209, 253; R. Exh. 14).

The Company apparently did, in fact, learn of the union meeting; indeed, several days later, on May 19, SMI Operations Manager Davidson called a mandatory meeting at the Kentucky Avenue facility to address the matter.[10] Between 15 and 20 employees attended. Davidson read and distributed a memorandum to the employees entitled "Strike Information." The memo stated that "rumors" had been circulating of a strike vote, which "surprise[d]" and "baffle[d]" the company. It briefly discussed the history of the parties' contract negotiations, noting that the parties had last met in August 2009 and that the Union had promised a counterproposal but never provided one. It notified the employees that "the Company will continue to operate during any strike," and "[i]f you engage in an economic strike, the Company has the legal right to temporarily or permanently replace any striker." The memo, however, made no mention of the unfair labor practice charges, or what the Company might do if the employees engaged in a ULP strike. (R. Exh. 10; Tr. 244, 599–600, 626.)

After Davidson read the memo, a number of employees asked questions, mostly about the contract negotiations, which Davidson attempted to answer (Tr. 601–604).[11] A few days later, on May 21, Davidson also distributed another memo providing "additional information" in response to questions raised at the meeting. Among other things, it advised the employees that Spurlino himself, as well as other designated company bargaining representatives, had met and bargained in good faith with the Union on numerous occasions; denied, as suggested by one question, that the parties had ever agreed to all the terms of a contract except a $1000 signing bonus; and stated that the Company would "continue to meet upon requests at every mutually agreeable time and place." (R. Exh. 11; Tr. 605–606.)

Approximately 10 weeks later, Cahill was alerted by the union steward (Bales) that SMI had a "big job" that was going to start on August 3 "rain or shine."[12] Accordingly, Cahill decided that the time was right for the employees to strike. Early that morning, he drove to the plant and gave a strike letter to Bales. Bales and the other two most senior employees (Sutherland and Mooney) then took the letter upstairs and gave it to SMI's operations supervisor/dispatcher, George Gaskin. (Tr. 152–153, 177–178, 210.)

The letter stated that the unit employees would be engaging in a strike effective that day. It further stated that the strike would be "an unfair labor practice strike," and that the strike would continue "until Spurlino Materials remedies the unfair labor practice it committed in discharging Gary Stevenson," including "an offer of reinstatement . . . and lost wages and benefits to date."

The letter also advised that the strike would "cover all work performed by the bargaining unit which is not subject to a labor agreement with a binding no strike clause." In this regard, it stated that the Union would "continue to honor Article 12 of the Project Labor Agreement for the Stadium and Convention Center Expansion Project"; that the unit employees assigned to that project would "fully perform all work covered by the PLA in accordance with that no strike provision"; and that the Union would not engage in any picketing at that jobsite (Jt. Exh. 5.)[13]

After receiving the letter, Gaskin told the employees to wait in the parking lot until Davidson arrived (Tr. 211). He then called Davidson and informed him what was happening (Tr. 584). Davidson arrived shortly thereafter. He told the employees that the Company intended to continue operating with replacements, and that, if they were not going to work, they had to leave.[14]

The employees thereupon left the parking lot and began picketing across the street with signs stating:

TEAMSTERS
EMPLOYEES OF SPURLINO MATERIALS
OF INDIANAPOLIS, LLP
ON
UNFAIR LABOR PRACTICE STRIKE
FOR THE ILLEGAL TERMINATION OF GARY
STEVENSON
LOCAL 716

(GC Exh. 4; Tr. 60, 84, 154, 188, 212–213, 254, 608).

The picketing continued throughout the strike, at locations near the facility and/or at certain jobsites where SMI delivered

[10] Unless otherwise indicated, all references to the SMI "facility" or "plant" refer to the Kentucky Avenue facility.

[11] There is conflicting testimony about whether there was any discussion at the meeting of Stevenson's discharge or other unfair labor practices. Employee Mooney testified that he recalled Davidson briefly discussing the firing of three drivers, including Stevenson (Tr. 244–245). However, there is no other testimonial or documentary evidence supporting Mooney's recollection, and, as discussed infra (fn. 40), he demonstrated poor memory about the timing of events generally, i.e. there is reason to believe he may have been remembering some other meeting. Further, Davidson specifically denied that any unfair labor practices in the pending Seventh Circuit case were discussed at the meeting (Tr. 615–626). Given that the agenda for the mandatory meeting was set by the Company and focused exclusively on the contract negotiations and how the Company would respond to an "economic" strike, it does not strain credulity to believe Davidson's testimony in this respect. Accordingly, I find that Stevenson's discharge and the other unfair labor practices pending before the Seventh Circuit were not discussed at the May 19 meeting.

[12] Bales' information was correct; SMI was scheduled to deliver 2000 cubic yards of concrete to Noblesville that day (a non-PLA job), which would have required 200 trips (Tr. 581–582).

[13] Art. 12 of the PLA specifically provides that signatory unions will not engage in, inter alia, any "economic or unfair labor practice strike." It further provides that signatory employers will not "cause, incite, encourage, or participate in any lockout of employees during the term of this Agreement." (Jt. Exh. 2, p. 26.)

[14] There is conflicting evidence whether Davidson talked to the employees immediately upon arriving, or only after going upstairs and reviewing the letter himself and speaking to Spurlino and the Company's attorney on the phone. Davidson and employee Mooney testified to the latter version (Tr. 57–58, 212, 584–585), but Davidson's notes from that day (R. Exh. 19) and employee Ipock's testimony (Tr. 734–736) support the former version. Fortunately, it does not really matter.

concrete (Tr. 158, 213, 260, 609). Most of the unit employees participated in, and picketed during, the strike (Tr. 178–179, 212, 583, 585). Stevenson himself also joined the picket line (Tr. 186).

As promised, SMI at all times continued operating during the strike. It did so by utilizing a total of about 10 SM employees from Ohio (Tr. 60–62, 323, 342, 350). It also hired approximately 16 permanent replacements, who were trained by the Ohio drivers (Tr. 69–70, 612). SMI assigned the Ohio drivers and replacements to both the stadium and convention center project, which was covered by the PLA, and its other projects. Although a number of the strikers offered to work on the stadium and convention center project, no such work was assigned to any of the strikers. (Tr. 66–67, 190–191, 211, 234, 588, 621–623.) SMI also denied a grievance that the Union filed on the fourth day of the strike (August 6) objecting to the Company's failure to assign the strikers such work (GC Exh. 5; Tr. 104–108).[15] Accordingly, at no time during the strike did any of the strikers actually perform any work for the Company (Tr. 622).

By August 11, after over a week of picketing, SMI had still not contacted the Union about reinstating Stevenson. Further, it appeared that work had slowed down considerably. Accordingly, Cahill gave Davidson a letter notifying him that the employees were prepared to end the strike and return unconditionally effective the following day, August 12. The letter therefore demanded that the employees be immediately recalled to work. (Jt. Exh. 6; Tr. 27, 70, 158–159, 192–193).

SMI, however, refused to recall any of the strikers. It advised the Union that, in its view, the strike was "either an illegal partial strike unprotected by the [Act] or, at best an economic strike," and that there were no jobs available as they had been filled with crossovers and permanent replacements (Jt. Exh. 7.) Thus, none of the 12 strikers at that time were placed on the call-in list or otherwise reinstated. (Tr. 51–52, 71–73, 215–216, 254.)[16]

C. Analysis

1. The "Single Employer" issue

As indicated above, there is no dispute that the unit employees are employed by SMI (Tr. 8). However, the General Counsel alleges, and SM denies, that SM is also an employer of the employees, i.e. that SM and SMI are a "single employer" of the employees.

a. Whether SM is collaterally estopped from contesting employer status

Prior to the hearing, the General Counsel filed a motion in limine seeking to prevent SM from presenting any evidence that it is not an employer of the unit employees. The General Counsel contended that SM is collaterally estopped from doing so, inasmuch as SM did not dispute and admitted that it was properly named as the respondent employer in its answer and briefs filed in the prior unfair labor practice proceeding involving the unit,[17] and SM was found to be the employer in that proceeding.

SM, however, argued that offensive collateral estoppel is inappropriate here because (1) the matter was never put in issue in the prior case; and (2) SMI has been found to be the employer of the subject employees in other proceedings; specifically, the 2006 representation proceeding in which the Union was certified by the Board, and a subsequent 2008 Federal court proceeding brought by the Union to compel arbitration of a grievance filed under the PLA at the stadium project (*Local 716, Teamsters v. Spurlino Materials of Indianapolis, LLC*, 2008 WL 2705556 (S.D. Ind. July 10, 2008)). (GC Exh. 1(o).)[18]

By pretrial order dated January 3, 2011, I denied the General Counsel's motion, essentially for the reasons stated by SM (GC Exh. 1(p)). Accordingly, the parties were permitted to fully litigate at the hearing whether SM and SMI are a single employer of the unit employees, and they did so.

Nevertheless, counsel for the General Counsel has continued to assert, both at the hearing (Tr. 8, 49) and in her posthearing brief, that collateral estoppel is applicable here, i.e. that SM is bound by its admission in the prior case. However, for the reasons set forth below, I adhere to my prior ruling that collateral estoppel is inappropriate.

The only supporting precedent cited by the General Counsel is *Allied Mechanical Services,* 352 NLRB 662, 664–665 (2008), reconsideration denied 356 NLRB 2 (2010). Specifi-

[15] As of the hearing, there had been no further communication or action with respect to the grievance (Tr. 106, 111).

[16] Although the complaint alleges that 14 employees engaged in the strike and have not been reinstated, uncontroverted evidence adduced at the hearing indicates that one (Rummell) crossed over after the first day and another (Thomerson) was on medical leave at the time and has also returned to work (Tr. 71–73).

[17] SM specifically admitted that it "has facilities located in Indianapolis"; that "in conducting its business operations [it] purchased and received at its Indiana facilities, goods valued in excess of $50,000 directly from outside Indiana"; that "at all material times [it] has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act"; that at all material times, Davidson and Gaskin have been its agents and supervisors within the meaning of Section 2(13) of the Act; that it leased a portable batch plant adjacent to the Indianapolis Stadium project; that it posted a notice at "its plant in Kentucky Avenue in Indianapolis, Indiana, and at its plants in Noblesville and Linden, Indiana, advertising for ready-mixed concrete truckdrivers for the portable batch plant that it established adjacent to the Stadium project"; that it tested individuals who applied for such openings; that it hired truckdrivers to work out of "its batch plant"; and that the January 2006 representation election was held among employees that it employs (GC Exh. 1(l), Attachments C & D).

[18] SM also noted that the Union named SMI in its strike letter, its offer on behalf of the employees to return to work, and its unfair labor practice charge. It contended that the designation of SM instead of SMI in the prior unfair labor case was "simply a clerical error that was never remedied"; a "mistaken designation" that "should be corrected." SM stated that it "seeks at this point to clear up that error and to ensure that the proper name of the entity certified as the employer . . . is properly designated." Response at 4 and 6. See also the attorney "disclosure statements" attached to SM's March 2010 brief to the Seventh Circuit supporting its initial petition for review of the Board's decision (Exh. G to the GC's motion), which state that the "full name" of "Spurlino Materials, LLC" is "Spurlino Materials of Indianapolis, LLC."

cally, the General Counsel cites the Board's statement in that case that

> [a]n issue need not be actively litigated at trial in order to be actually litigated for purposes of collaterally estopping a party from relitigating that issue. Otherwise, admissions in answers, failure to contest material facts in summary judgment dispositions, and stipulations or failures to present evidence at trial would have no issue preclusion consequences. See *Abbot Bank v. Armstrong*, 44 F.3d 665 (8th Cir. 1995) (issue of whether bank was creditor held "actually litigated" in prior case, where creditor status had not been judicially resolved but, rather, was "inherent" and necessary to judgment in case and was admitted in answer).

Allied Mechanical, however, is distinguishable on its facts. There, the relevant allegation (that the union was the 9(a) representative of the bargaining unit employees) had been denied in the respondent's answer, and had therefore been "squarely placed in issue," in the prior proceeding. 352 NLRB at 664. The cited Eighth Circuit decision in *Abbot Bank* is also distinguishable, as the second proceeding there was actually a continuation of the first, i.e. the second proceeding arose in the same bankruptcy case. See 18A Fed. Prac. & Proc. Juris. § 4443, fn. 5 (2d ed., updated through 2010).

Moreover, as noted by SM, to the extent the Board's quoted statement in *Allied Mechanical* could be interpreted to include admissions in separate cases, it appears to conflict with statements in other Board decisions. See, e.g., *Harvey's Resort*, 271 NLRB 306 (1984) ("On the other hand, if a matter is not actually litigated in the first proceeding, that is, if the answer to a complaint fails to put the matter in issue, then collateral estoppel is inapplicable because the issue is in reality being litigated for the first time in the second proceeding [citing James & Hazard, Civil Procedure sec. 11.17 (Little, Brown & Co. 1977)]). See also *National Marine Engineers Beneficial Assn. v. NLRB,* 274 F.2d 167, 172 (2d Cir. 1960).

Finally, even assuming arguendo that *Allied Mechanical* may properly be read to permit the use of offensive collateral estoppel based entirely on a respondent's admissions in a prior case, it does not purport to repeal the trial judge's "broad discretion" to reject its use in a particular instance. See *In re Microsoft Corp. Antitrust Litigation*, 355 F.3d 322, 326 (4th Cir. 2004) (quoting *Parklane Hosiery v. Shore*, 439 U.S. 322, 331 (1979)). In this instance, given the history of contrary Board and court findings during the same general time period, i.e. the Board's 2006 Certification of Representative and the Federal court's 2008 decision in the PLA litigation naming SMI, rather than SM, as the employer of the subject employees, I reaffirm my previous ruling that the better course—in the absence of a satisfactory stipulation—is to permit litigation of the issue and thereby finally resolve whether the employees are employed by both SM and SMI as a single integrated enterprise. See *National Marine Engineers Beneficial Assn.,* 274 F.2d at 175.

b. Whether SM and SMI are a "single employer"

The test for determining whether two or more entities are a "single employer" is whether they have failed to maintain the kind of arm's-length relationship that would normally characterize separate and independent companies. In applying this test, the Board focuses on four factors: (1) common ownership or financial control; (2) common management; (3) interrelation of operations; and (4) common control of labor relations. However, no single factor is considered determinative and all four need not be present. Rather, the Board considers all the circumstances to determine whether the test is met. See, e.g., *Carnival Carting,* 355 NLRB 297, 300 (2010); and *San Luis Trucking,* 352 NLRB 211, 226 (2008), reaffirmed and incorporated by reference 356 NLRB 168 (2010). See also *NLRB v. Palmer Donavin Mfg.,* 369 F.3d 954, 957 (6th Cir. 2004); *RC Aluminum v. NLRB*, 326 F.3d 235 (D.C. Cir. 2003); and *Emsings Supermarket,* 872 F.2d 1279, 1287 (7th Cir. 1989).

Applying the foregoing principles, I find that a preponderance of the evidence establishes that SM and SMI are a "single employer" of the unit employees, as alleged.

Common Ownership or Financial Control

As noted above, James Spurlino has at all times been the majority, and therefore controlling, owner of both SM and SMI. He currently owns 100 percent of SM and 52 percent of SMI, with the remaining 48 percent divided equally between his father, Cyrus, and another company owned by a longtime friend. (Tr. 367, 370, 447, 464–465, 468). Further, as limited liability companies, neither SM nor SMI has a board of directors and all profits are distributed directly to the owners as personal income (Tr. 365, 466, 645). Accordingly, I find that there is substantially common ownership and financial control. Cf. *Bolivar Tees,* 349 NLRB 720 (2007), enfd. 551 F.3d 722 (8th Cir. 2008); *Hahn Motors*, 283 NLRB 901 (1987); and *V.I.P. Radio*, 128 NLRB 113 (1960).

Common Management

As discussed above, SMI has its own operations manager (Davidson) and operations supervisor/dispatcher (Gaskin). The record indicates that they exercise significant independent authority over SMI's day-to-day operations. (Tr. 55–57, 79, 567–569, 643–644, 648, 684.) Further, neither performs any work for SM in Ohio, which has its own operations managers and dispatchers. Nor do the operations managers for SM in Ohio perform any work for SMI. (Tr. 55, 80, 370–371, 668–671, 680.)

However, the absence of such common day-to-day management is not considered significant, particularly where, as here, the facilities are geographically separate. Rather, the relevant inquiry is whether there is "overall control of critical matters at the policy level." *Bolivar Tees,* 349 NLRB at 721 fn. 4; *Emsings Supermarket,* 284 NLRB 302, 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989); and *Sakrete of Northern California, v. NLRB*, 332 F.2d 902, 907 (9th Cir. 1964), cert. denied 85 S.Ct. 649 (1965).

Here, as indicated above, Spurlino is the president and manager of both SM and SMI. Further, it is undisputed that he makes the major decisions for both companies (Tr. 366, 569). He determines the strategic direction, operating procedures, and values of the companies (Tr. 643–644). He signs the property leases for both companies (Tr. 684), and decides whether to sell assets (Tr. 370). He sets up lines of credit with financial institutions (Tr. 429), authorizes cash advances and payments be-

tween the two companies to pay their debts (Tr. 485–486), and directs their accounting procedures (Tr. 513–514, 781). He executes agreements between the two companies (signing for both), and decides whether and how much they charge for services, equipment, and workers (Tr. 351, 400–403, 527, 674, 764; GC Exhs. 37, 38). He also approves invoices submitted to SM and/or SMI from vendors (Tr. 378, 381, 766; GC Exh. 42). And he is directly involved in pricing large projects and making major purchases (Tr. 569, 685). Accordingly, I find that this factor also supports single-employer status. Cf. *Carnival Carting,* 355 NLRB 297, 301; and *Bolivar Tees,* 349 NLRB at 721.

Interrelation of Operations

As indicated above, SM and SMI were created and licensed separately, are geographically removed and serve different markets in different states, and have their own personnel and equipment. They also have separate bank and credit card accounts, and keep separate financial records. (Tr. 329–337, 368–371, 383, 392, 463–466, 492, 533, 643–646, 654, 655–660, 668–671, 677–678; GC Exhs. 19, 30.)

However, they have a common general business purpose: the delivery of concrete to construction sites. Further, SM helped to start up SMI (Tr. 398–399, 453–454) and they hold themselves out as the same enterprise (i.e. simply as "Spurlino Materials") on their common internet website, their business cards, stationery, and documents, and their trucks (Tr. 281, 300, 328, 334, 352, 461–462; GC Exhs. 7, 11, 15, 21, 22).[19] Cf. *Palmer Donavin Mfg.*, 369 F.3d at 957; *Bolivar Tees,* 349 NLRB at 721; *Southern Interiors,* 319 NLRB 379 (1995), enfd. 107 F.3d 12 (6th Cir. 1997) (table); and *Hahn Motors*, 283 NLRB at 901. They are also specifically listed as "related parties" on at least some of the annual financial statements prepared by Battelle & Battelle LLP, the accounting firm that prepares such statements for both companies (Tr. 371, 385). Cf. *Three Sisters Sportswear*, 312 NLRB 853, 863 (1993), enfd. 55 F.2d 684 (D.C. Cir. 1995) (table), cert. denied 116 S.Ct. 814 (1996).

Moreover, both Spurlino and Davidson have, at least sometimes, specifically referred to the companies as a single entity. Thus, in an April 2009 letter to "All Indianapolis Employees," Spurlino noted that "many of our employees living in Ohio, Indiana, and Kentucky" earned bonuses because they had helped make "the company" successful, and that "we are the same fair and consistent employer that several hundred people have worked for over the years" (GC Exh. 11). Similarly, early in the hearing in this case, Davidson referred to SM as "our Ohio division" when discussing how SMI continued operating during the strike (Tr. 63). SM's controller, Richard Bumgardner, also referred to the Ohio and Indiana operations as "divisions" in describing the disability insurance bill that is submitted to SM for the two companies (Tr. 525). Cf. *Three Sisters Sportswear*, 312 NLRB at 863. Further, as discussed above, SM did not dispute that it was the employer of the Indianapolis unit employees in the prior ULP case.[20]

The record indicates that there is good reason for this, i.e. there is substantial evidence that the companies' operations are, in fact, interrelated. Thus, SMI continues, for certain purposes, to use the Middletown, Ohio address, the address set forth in its original operating agreement (GC Exh. 45) and SM's primary address (Tr. 364, 465). For example, all invoices for SMI's purchases and most payments to SMI are sent to SM's Middletown facility. And SM's controller (Bumgardner) also does all of the accounting for SMI, i.e. "runs the accounting department" for both companies. (Tr. 285, 325–326, 480–481, 781, 786; GC Exh. 42.) Cf. *San Luis Trucking,* 352 NLRB at 227; *In re Bristitzky*, 323 NLRB 524 (1997); and *Hahn Motors*, 283 NLRB at 905.

There is also a significant history of both permanent and temporary employee interchange between the companies. Thus, Davidson was the operations manager for SM for 5 years before permanently transferring (without completing a new employment application) to the same position at SMI in 2006 (Tr. 54, 278, 567). Cf. *Hahn Motors*, 283 NLRB at 904; and *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040, 1047 (D.C. Cir. 1975), affd. in part 425 U.S. 800 (1976). Employees for each company also periodically perform work for the other company on a temporary or part-time basis. For example, SM's sales manager in Ohio (Raussen) spends a couple days a month in Indianapolis helping out the sales staff there, i.e. providing training, planning, mentoring, and strategic support (Tr. 760, 784–785). In addition, although SMI has its own mechanical maintenance employee, an SM employee (Shelton) does major welding repair work in Indianapolis off and on, for a total of about 4 weeks or so a year (Tr. 74–75, 294, 319–321, 349).

SM truckdrivers also occasionally deliver concrete for SMI, and vice-versa (Tr. 66, 76–78, 255–256, 296–299, 322–323, 343–350, 651). Indeed, prior to the strike, SMI and SM had jointly scheduled at least six employees from Ohio to work in Indianapolis on August 3 to cover SMI's heavy workload at that time.[21] Further, as indicated above, several additional Ohio employees were sent to Indianapolis after SMI received the strike letter, to deliver concrete and train the replacement workers.

Finally, there is substantial evidence that the companies'

[19] SMI does not pay a fee for the right to use the name "Spurlino Materials" (Tr. 476).

[20] Although not dispositive, SM's factual admissions in its pleadings in the prior case are admissible and cognizable evidence under FRE 801(d)(2). See *Enquip, Inc. v. Smith-McDonald Corp*., 655 F.2d 115, 117–119 (7th Cir. 1981); 30B Federal Practice & Procedure § 7026 (1st ed., updated through 2010); and 4 Federal Evidence § 8:44 (3d ed.) (updated through 2010). See also *NLRB v. Consolidated Bus Transit,* 577 F.3d 467, 474 (2d Cir. 2009) ("We have even suggested that a party's admission in a Board proceeding may carry evidentiary weight in future cases brought before the Board. *See National Marine Engineers Beneficial Assn.,* 274 F.2d at 172 ('To be sure since the answer was not limited to the particular case, the admission [that the respondents were "labor organizations"] was evidence against [the respondents] elsewhere, and this was not deprived of evidential force by the subsequent unsuccessful attempt to withdraw it.')").

[21] The precise number is somewhat unclear. Davidson initially testified that SMI used up to 10 Ohio employees a day, and a total of 12–15 over the first few days of the strike, of which 6–8 had been previously scheduled (Tr. 60–62). However, he later testified that 8–10 Ohio employees had been prescheduled (Tr. 291), and still later testified that only 6 had been prescheduled (Tr. 342).

transactions between each other are not entirely at arms length. For example, although the companies charge for their shared equipment, labor, and services, they do not actually invoice each other. See Tr. 303, 343–344; compare Tr. 301–302 (unrelated companies invoice SMI for leased trucks and drivers).[22] While Bumgardner will note the charges on a general ledger, the entries are not always sufficient to explain the reason or basis for the transaction (Tr. 502–506). Moreover, not all services are charged based on their actual cost. Thus, certain services, including invoicing, financial statements, and other accounting functions, as well as some sales (i.e. Raussen) and executive (i.e., Spurlino) services, are allocated to SMI based solely on SMI's percentage of the total sales made by SM and SMI (and two other companies owned and managed by Spurlino). (GC Exh. 37; Tr. 402–404, 443–447, 450, 489–490, 645, 760.) There is no evidence of any similar arrangement with unrelated companies.

SM also frequently makes large cash advances to SMI, which are used to cover SMI's debts and/or pay down its line of credit with the bank (on which SMI currently owes about $4 million). These cash advances are made by SM, either by writing its own check or by signing over a customer check, without any loan agreement, repayment terms, or interest—notwithstanding SMI's long-term high negative balances (consistently over $500,000, and as high as $1.1 million, since February 2010).[23] (Tr. 386–387, 413–414, 448, 484, 498–502, 504, 506, 528, 539, 771–772, 775; GC Exh. 19.) Cf. *San Luis Trucking,* 352 NLRB at 227; *Denart Coal*, 315 NLRB 850, 852 (1994), enfd. sub nom. *Vance v. NLRB*, 71 F.3d 486 (4th Cir. 1995); and *Edward C. Kelly Co.,* 230 NLRB 337, 339 (1977). Again, there is no evidence of any similar, interest-free cash advances to unrelated companies.[24]

The record indicates that SM also regularly pays SMI's bills directly. For example, although Davidson transferred to SMI 5 years ago, he still uses an SM credit card, and his charges are therefore paid for by SM (Tr. 531, 535–536). SM also pays for SMI's medical insurance policy (Anthem), even though the companies have different policies and are billed separately (Tr. 501–503, 526; GC Exh. 19). It also pays SMI's portion in those circumstances where the vendor for both companies submits a single, commingled invoice to SM. Such commingled invoices are regularly submitted by their common business-development firm (McGraw Hill), accounting firm (Battelle & Battelle), telephone provider (Verizon), 401(k) plan administrator (Fidelity), and disability insurance provider (Guardian). SM and SMI also receive their Federal heavy highway use tax in one bill. (Tr. 387–390, 412–413, 451, 486, 494–497, 503, 525, 530–538, 786–787; GC Exh. 19.)[25] In all of these circumstances, Bumgardner will charge SMI's account after making the payment from SM's account. However, again, SM will not actually invoice SMI for these payments, and the brief entries on the general ledger are not always sufficient to explain the reason for a transaction (Tr. 389–390, 502, 506). Moreover, as above, there is no evidence that SM provides similar bill-payment services to unrelated companies.

The same is true with respect to other financial transactions. For example, the ledger shows frequent movement of large sums of money between the two companies, typically on the last day of the month, which are described simply as a "reclass" (i.e reclassification). Two of the more notable examples are entries on July 31, 2008, which show four "reclass" credits totaling $320,000 and three "reclass" debits totaling $527,000, and on November 30, 2009, which show three "reclass" credits totaling over $250,000 and two "reclass" debits totaling over $150,000. (GC Exh. 19, pp. 5, 8.) Both Spurlino and Bumgardner admitted that there are no invoices or other documentation explaining such "reclass" entries. Nor could either adequately explain the entries from memory. (Tr. 407, 483–484, 493–498, 502.) All they could offer were several possible, non-specific explanations for each "reclass" entry: the entry could mean that a prior erroneous data entry was corrected; it could mean that money was reclassified from one account to another to balance the books between the two companies so that each did not have both an accounts payable and an accounts receiva-

[22] The record contains conflicting testimony about how much SM charges SMI for shared labor. Spurlino testified that he sets the rates and that SM typically charges other companies, including SMI, the employee's regular wage plus a 30 percent premium to include the cost of the employee's benefits and SM's overhead and profit (Tr. 411, 436, 441–442, 673–674). Bumgardner generally corroborated this testimony with respect to labor that SM provides to one of the other related companies owned and managed by Spurlino (Bison Concrete). However, Bumgardner testified that Spurlino does not tell him how much to charge for SM employees who perform work for SMI, and that the amount charged SMI for such employees, including Shelton, is based on the employee's regular hourly rate at SM. (Tr. 486–487, 496, 524, 527–528). See also Davidson's testimony, Tr. 293, 323 (acknowledging that he is not aware of any contractual or lease agreement between SM and SMI setting the rate to be charged SMI for the use of Shelton or other SM employees). I give greater weight to Bumgardner's testimony, as he is the one who does the calculations and makes the charges based on information provided by the employees or operations managers (Tr. 284–289, 293–294, 303–304, 486–487). Further, as discussed below, Spurlino's testimony is inconsistent with the weight of the evidence in various other respects as well.

[23] Spurlino testified that SMI has also made cash advances to SM in the past, likewise without any loan agreement, payment terms, or interest (Tr. 387, 653, 788). However, Bumgardner testified that he could not recall SMI ever making any cash advances to SM (Tr. 778). In any event, the record indicates that SMI has usually carried a negative balance with SM. (GC Exh. 19; Tr. 653.)

[24] At the hearing, Spurlino attempted to minimize the significance of SM's large, interest-free cash advances to SMI, noting that some of SM's customers also carry negative balances with SM due to their failure to timely pay for SM's services, and that SM does not impose finance charges or interest on such overdue or bad debts. See Tr. 449; see also Tr. 653 (denying that there is any financial relationship between SM and SMI other than selling each other services and occasionally renting equipment). However, Spurlino acknowledged that SM does not give interest-free cash advances to customers (Tr. 473).

[25] In light of the above-cited evidence (Bumgardner's testimony and SMI's general ledger), I discredit Spurlino's testimony to the extent it suggests that SM only pays for SMI's bills when they are combined with SM's bills on one invoice (Tr. 387, 451, 786–787). For the same reason, I also discredit Spurlino's testimony to the extent it suggests that Verizon submits separate invoices for SM and SMI (Tr. 426).

ble at the end of the month;[26] or it could reflect a payment for the rental of equipment and labor for the month. Further, they acknowledged that there is no way of knowing from the ledger which, if any, of these was the actual reason for the transaction. (Tr. 409–410, 434, 488, 508–515, 522–523). Cf. *Emsings Supermarket,* supra.[27]

Accordingly, based on all the foregoing circumstances, I find that this factor also supports single-employer status.

Common Control of Labor Relations

As indicated above, SM and SMI have their own operations managers and dispatchers who exercise significant independent day-to-day operational authority, including hiring, directing, and supervising the employees of the respective companies (Tr. 57, 63, 282–286, 303–304, 331, 339, 348, 376–377, 568, 627, 680). Since 2008, Davidson has also served as the sole management representative (along with SMI's attorney) during the contract negotiations, and he conducted the mandatory "strike information" meeting with the unit employees in May 2010 (Tr. 569, 579–580, 594–597, 613, 618).

However, it is clear that Spurlino, as majority owner, president, and general manager of both companies, has the ultimate authority over the labor relations of both. Further, the record shows that he has actually exercised that authority. He determined the initial wages and benefits for the employees of both companies (Tr. 661, 691; see also R. Exh. 10, p. 2 ("Jim Spurlino . . . promised to pay competitive wages and benefits in the meeting with employees on the day we took over the American Concrete operations").[28] He also continues to be involved, at least sometimes, in deciding the amount of wage increases to be granted to unit employees at both SM and SMI (Tr. 686–687; GC Exh. 11).[29] And he is consulted, at least sometimes, by the operations managers at SM and SMI about expanding the work force, i.e., about the number of employees to hire (Tr. 339, 690), and about terminating employees (Tr. 284, 569, 690).[30]

In addition, although Davidson has been the Company's representative at the bargaining table, Spurlino has also personally met with the Union and its attorney and communicated directly with employees regarding the collective-bargaining negotiations (GC Exh. 11; Tr. 694). Further, Davidson has made clear to the employees that Spurlino has the final say with respect to any agreement. See R. Exh. 11, p. 2 ("Jim Spurlino has never been given a contract to sign. If an agreement had been agreed to in the negotiations, then ratified by the employees, Jim would have signed it.").

Finally, the record indicates that Spurlino at least helped Davidson draft the two "strike information" memos that were given to employees on May 19 and 21, 2010 (R. Exhs. 10, 11; Tr. 605, 614, 617, 624). And Davidson admitted that he did not himself make the decision to exclude the strikers from working on the stadium and convention center project (Tr. 68).

In sum, therefore, I find that all four of the relevant factors support a finding that SM and SMI are a single integrated enterprise.

2. The refusal to reinstate the former strikers

As indicated above, the General Counsel contends that the Respondents were required to immediately reinstate the employees because the strike was caused by their unfair labor practices; specifically, the unlawful discharge of Stevenson in February 2007 and subsequent failure to offer him reinstatement as required by the Board's decision and order. *Mastro Plastics v. NLRB*, 350 U.S. 270, 278 (1956) (unfair labor practice strikers are entitled to immediate reinstatement to their former positions even if replacements have been hired).

The Respondents, on the other hand, contend that they had no obligation to immediately reinstate the striking employees. The Respondents assert two, alternative bases for this position. First, they contend that the employees actually struck to protest the failure to agree to their demands in negotiations over a first contract, and were therefore engaged in an economic, rather than an unfair labor practice, strike. See *NLRB v. Mackay Radio & Telegraph*, 304 U.S. 333, 345 346 (1938) (economic strikers who have been permanently replaced are not entitled to immediate reinstatement). Second, the Respondents contend that the employees were engaged in an unprotected partial strike because they continued to offer and demand to work on the stadium and convention center project. See, e.g., *Valley City Furniture*, 110 NLRB 1589, 1594 (1954), enfd. mem. 230 F.2d 947 (6th Cir. 1956) (employees who engage in a partial strike lose their protection under the Act, even if the strike was caused by employer's unfair labor practices).

For the reasons set forth below, I find that the Respondents' contentions lack merit, and that the Respondents violated the Act as alleged.

[26] At Spurlino's direction, Bumgardner regularly nets or balances out the accounts of SM and SMI and other related companies owned and managed by Spurlino (Tr. 513–514, 781).

[27] There is no contention that the annual financial reports prepared by Battelle & Battelle (which were not actually placed in evidence due to confidentiality concerns) provide any further information or confirmation regarding the reasons for the transactions. The reports are based on a "review," which is substantially less in scope than an "audit" in accordance with generally accepted accounting standards (Tr. 383, 455, 524). See also Dictionary of Accounting Terms, at http://www.allbusiness.com/glossaries/ review (a review "is not an audit nor does it furnish a basis for an opinion since there is no appraisal of internal control nor gathering of audit evidence"). Further, as indicated, there is often no documentation of the transactions between SM and SMI for Battelle & Battelle to review.

[28] SMI was created in early November 2005 for the purpose of purchasing the assets of American Concrete in Indianapolis, and did so shortly thereafter. See, e.g. Tr. 397, 643.

[29] Spurlino testified that there are substantial differences between the employees' wages and benefits and other terms and conditions of employment at SM and SMI (Tr. 662–665, 670–673). He also testified that there is a substantial difference in how they are dispatched: Indianapolis is by seniority; whereas Ohio uses a rotating "wheel" dispatch procedure (Tr. 666–667). However, such differences are not surprising or significant given that SMI's employees are unionized and SM's are not. See, e.g., *Edward C. Kelly Co.,* 230 NLRB at 339.

[30] The record as a whole leaves me more than a little skeptical about the cited testimony to the extent it appeared to minimize Spurlino's role in these matters. Indeed, I am persuaded that he actually exercises his authority on such matters more than just sometimes. However, I find that sometimes is sufficient under the circumstances. See *Denart Coal*, 315 NLRB at 853.

a. Whether the strike was an unfair labor practice strike

In evaluating whether a strike was an unfair labor practice or economic strike, the Board examines the objective and subjective facts to determine the employees' motivation for striking. See, e.g., *Executive Management Services*, 355 NLRB 185 (2010); *Chicago Beef*, 298 NLRB 1039 (1990), enfd. 944 F.2d 905 (6th Cir. 1991) (table); and *C-Line Express*, 292 NLRB 638 (1989). This approach is complicated by the fact that employees may actually have more than one motive, i.e. they may hope to pressure their employer *both* to reverse its unfair labor practices *and* to agree to favorable economic terms. However, the law is clear that striking employees do not lose their protection from permanent replacement simply because only one of their goals is to reverse their employer's unfair labor practices, even if it is not their primary goal. See, e.g., *Northern Wire v. NLRB,* 887 F.2d 1313, 1319–1321 (7th Cir. 1989) ("A strike that is caused *in whole or in part* by an employer's unfair labor practices is an unfair labor practice strike"); *NLRB v. Moore Business Forms,* 574 F.2d 835, 840 (5th Cir. 1978) ("The employer's unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor"); G*eneral Drivers & Helpers Union, Local 662 v. NLRB,* 302 F.2d 908, 911 (D.C. Cir. 1962) ("if an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike"), cert. denied 83 S.Ct. 48 (1962).

Here, there is abundant evidence that the August 2010 strike was motivated, at least in part, by the Respondents' unfair labor practices. As indicated above, the Union called the prestrike meeting for the purpose of taking a vote whether to engage in a ULP strike; the Union's attorney explained to the employees at the meeting the differences between a ULP and an economic strike; it was recommended to the employees that the strike be a ULP strike; the employees unanimously voted to engage in a ULP strike; both the Union's strike letter and the employees' picket signs specifically stated the employees were engaging in a ULP strike to protest the unlawful discharge of Stevenson; and at no time during the strike did the Union make any economic demands on the Company (Tr. 159).

Further, both of the former strikers who testified about the May 2010 meeting and vote stated that the unfair labor practices were at least one of the reasons they voted to strike. Thus, employee Mooney testified that he voted "yes" and picketed because

> it's been going on for 5 years. We won several things through the courts and Spurlino never follows through on what we won and just over the years you just getting tired of it, you're trying to do what's best for you and for the other people you work for. (Tr. 208–209.)
>
> . . . .
>
> [W]e wanted to get our point across that we was still here—for 5 years we've been fighting for negotiations and stuff and we pretty much went to work all this time—nothing ever really did happen—you know—as far as I consider for negotiations on contracts and stuff even though they did talk. And we just wanted to step up and let them know that we're here, that we're fighting together and we haven't given up on—you know—all the unfair labor practices and the firing of Gary Stevenson and hopefully later on down the road maybe we can start negotiation[s] back up for a contract. (Tr. 213.)

(See also Tr. 225.) Similarly, employee Poindexter, testified that he voted to go on strike because

> it wasn't only about Gary Stevenson to me. It was unfair that they were not allowing [Stevenson] to come to work over something that was handed to him, that they knew they should not have.[31] But it was also about sticking together and in my opinion, if it was me in that situation, I would hope that all the drivers would have my back (Tr. 252).

The Respondents argue that all of the foregoing evidence must be rejected as "self serving," citing, inter alia, *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503 (4th Cir. 1998); *NLRB v. Colonial Haven Nursing Home,* 542 F.2d 691 (7th Cir. 1976); and *Winn-Dixie Stores v. NLRB*, 448 F.2d 8 (4th Cir. 1971). However, this case bears little resemblance to those cases. For example, in *Pirelli Cable*, the sole unfair labor practice found was a single 8(a)(1) statement that the employees could lose their jobs if they went on strike. The court found that the employer's statement was not coercive in context, and that even if it was, the relevant testimonial evidence, which came exclusively from union officials, was insufficient to support a conclusion that the union members, rather than just the union officials, were upset by the statement (141 F.3d at 515–519). Similarly, in *Colonial Haven,* the court emphasized that the prestrike 8(a)(1) violations were "extremely mild" and "technical in nature," and their connection or importance to the employees' overall objective in that case (obtaining immediate recognition without an election based on authorization cards) was remote (542 F.2d at 694, 706). And in *Winn-Dixie*, the *only* evidence indicating that the strike was over unfair labor practices was testimony by strikers, which was inconsistent with other evidence, including the language on the picket signs (448 F.2d at 12).[32]

Here, in contrast, the unfair labor practice—the 8(a)(3) discharge of one of the most active union supporters and a member of the bargaining committee[33]—cannot reasonably be characterized as a minor violation of the Act, and its connection or importance to the employees' ultimate objective (obtaining an acceptable first contract) is more apparent. Further, two employees testified that Stevenson's discharge was, in fact, a significant reason they voted to go on strike, and their testimony is consistent with other evidence, including the picket signs. Cf.

[31] See 353 NLRB at 1213 (describing the evidence regarding the circumstances leading up to Stevenson's suspension and discharge).

[32] Other cases cited by the Respondents, including *California Acrylic Industries v. NLRB*, 150 F.3d 1095 (9th Cir. 1998), and *Filler Products v. NLRB*, 376 F.2d 369 (4th Cir. 1967), are clearly distinguishable for similar reasons. It is also noteworthy, of course, that the Board had reached a different conclusion than the court in *Pirelli Cable, Colonial Haven, Winn-Dixie, California Acrylic,* and *Filler Products.*

[33] As indicated in the Board's prior decision (353 NLRB at 1199, 1205, 1212, 1220), Stevenson served on the Union's preelection organizing committee, was an observer during the Board election, and was an elected employee representative on the Union's bargaining committee. (See also Tr. 243.)

NLRB v. Midwestern Personnel Services, 322 F.3d 969, 979–980 (7th Cir. 2003); and *Northern Wire,* 887 F.2d at 1321 fn. 3 (distinguishing *Pirelli Cable* and/or *Colonial Haven* on similar grounds).

The Respondents also argue that all of the above evidence should be discredited for various other reasons. Specifically, they cite: (1) the passage of over 3 years between Stevenson's discharge and the strike; (2) the employees' expressed frustration at the lack of progress in the contract negotiations; (3) the employees' failure to raise the issue of Stevenson's discharge at the Company's prestrike mandatory meeting; (4) the Union's failure to request the reinstatement of Stevenson during contract negotiations or any other time leading up to the strike; (5) the Union's carefully planned efforts to ensure that the strike was a ULP strike; and (6) certain statements made by strikers during the strike. However, as discussed below, none of these facts or circumstances provide substantial support for the Respondents' position.

(1) *Passage of time between Stevenson's discharge and strike.* As noted by the Respondents, passage of time is a factor considered by the Board and courts in evaluating whether a strike was caused by unfair labor practices. However, it is not conclusive. See *R & H Coal*, 309 NLRB 28 (1992), enfd. 16 F.3d 410 (4th Cir. 1994) (finding that strike was caused by the employer's unfair labor practices even though it was not called by the union until 13 months later); and *Lapham-Hickey Steel Corp. v. NLRB,* 904 F.2d 1180, 1186–1187 (7th Cir. 1990) (upholding the Board's ULP-strike finding despite the passage of 7-1/2 months since the unlawful conduct).

Further, it has little force in the circumstances of this case. As indicated above, the Stevenson unfair labor practice case was being actively litigated before the NLRB until the Board issued its reinstatement order in March 2009. Moreover, a long time had also passed since there was any movement toward a final resolution in the contract negotiations; as indicated above, the parties' last bargaining session was in August 2009. Thus, if, as the Respondents contend, the passage of time suggests that the employees were not motivated by the Respondents' failure to remedy the unfair labor practices, it also suggests that they were not motivated by the Respondents' failure to agree to their contract demands. Both, of course, cannot be true; the strike was motivated by something. And it is equally as likely, based on the passage of time, that it was motivated by the former as the latter (or both).

Nevertheless, the Respondents attempt to distinguish the two situations based on Cahill's admission that the employees were expecting a counterproposal from the Company in the spring of 2010 (Tr. 556), and employee Poindexter's testimony that he was upset by the Company's failure to make one at that time (Tr. 270). However, the employees were also informed that the settlement negotiations in the Stevenson case had recently failed before the Seventh Circuit (Tr. 99–100). As for Poindexter's testimony, he appeared to be referring to a prior occasion where the Company attorneys were supposed to bring a proposed written contract to a union meeting, but failed to do so. Although he testified that this meeting was in April 2010, he also repeatedly testified that Cahill's predecessor (Green) was president at the time (Tr. 268–269). However, Green retired from the Union, and Cahill became president, in March 2009 (Tr. 87–89, 144, 548, 569–572, 594).[34] In any event, as indicated above, Poindexter specifically testified that he voted to strike at least in part over what had happened to Stevenson.

Finally, there is no contention or evidence that anything significant happened during the 2-1/2-month period between the May 13 vote and the August 3 strike to make the contract negotiations become a more important, much less an exclusive, reason for the strike. Indeed, the only significant event disclosed by the record was the mandatory meeting held by the Company on May 19, and subsequent May 21 memo, wherein Davidson advised the employees that it was *the Union* that had failed to provide a counterproposal, and that the Company would "continue to meet upon requests at every mutually agreeable time and place."

(2) *Employees' expressed frustration regarding the contract negotiations*. The Respondents also cite the fact that employees expressed frustration, both prior to and at the May 13 union meeting, about the lack of progress in the contract negotiations. However, as found above, they likewise expressed frustration about the delay in finally resolving the Stevenson unfair labor practice case. Thus, at best, the former indicates that the latter was not the sole reason for the strike.

(3) *Employees' failure to raise Stevenson's discharge at the company meeting*. The Respondents also cite the employees' failure to question Davidson about Stevenson's discharge or the other unfair labor practices in the pending Seventh Circuit case at the mandatory company meeting on May 19. However, as noted above (fn. 11), this is not especially remarkable given that the agenda was set by the Company and focused exclusively on the contract negotiations and how the Company would respond to an "economic" strike.

(4) *Union's failure to request Stevenson's reinstatement*. This is certainly the weakest of the Respondents' arguments. Although it is uncontroverted that the Union did not raise Stevenson's discharge during the contract negotiations (Tr. 581, 596), contract negotiations are for negotiating over the terms of a contract. See *Wilkie Co*., 333 NLRB 603, 614 (2001), enfd. 55 Fed. Appx. 324 (6th Cir. 2003) (unpub.). Further, as noted by Cahill, there was no need or compelling reason to specifically request Stevenson's reinstatement prior to the strike given that the Board had already unconditionally ordered that Stevenson be offered reinstatement (Tr. 185).[35]

(5) *Union's efforts to ensure that the strike was a ULP strike*. This is also a curious argument. As indicated above, it is uncontroverted that the employees at the May 13 meeting freely and unanimously voted, by secret ballot, to engage in a ULP strike. There is no evidence whatsoever that the employees were threatened or otherwise coerced by Cahill or other

[34] Poindexter appeared to acknowledge a similar mistake in testifying about the last time he had seen a proposed contract. He initially said he had not seen one since April or May 2010 (Tr. 251), but on further questioning corrected the date to 2009 (Tr. 266), which is consistent with the weight of the evidence (R. Exh. 13; Tr. 569–572; see also Tr. 236, 245–246 (employee Mooney's testimony)).

[35] This fact also clearly distinguishes *Winn-Dixie Stores*, supra, where the unfair labor practice charges had not even been filed at the time the employees went on strike.

union officials. Nevertheless, the Respondents argue that an adverse inference should be drawn from the fact that Cahill and Lohman advised the employees on whether to engage in a ULP or economic strike, educated them about the rules for engaging in a ULP strike, and provided assistance to them so that they followed the rules and did not lose their jobs. Such an argument must obviously fail; to hold otherwise would require employee representatives to be nothing but potted plants. See also *Dorsey Trailers*, 327 NLRB 835, 856 (1999), enfd. in relevant part 233 F.3d 831, 839 (4th Cir. 2000) (rejecting a similar argument, noting that it was the employer that committed the unfair labor practices and the union could not "be blamed for having had sufficient foresight and being intuitive enough to advise its members against walking out to protest something other than unfair labor practices").

(6) *Statements by strikers*. This last argument, like the first, requires more discussion. The Respondents cite several statements made by the strikers, which they argue reflect the true economic motive of the strike. Each is addressed below.

Employee Ipock's statements. Davidson testified that, on the morning of the strike, he had the following conversation with employee Ipock in the parking lot in the presence of Mooney and other named employees:

> [Ipock] . . . first made a comment about—that we, or Spurlino Materials, couldn't replace them, or him permanently, if they were on an unfair labor practice strike. And I just reiterated to him that we were going to hire replacement employees because we had to continue to run the business. After that . . . he stated that—he said, "Jeff, you know this doesn't have anything to do with Gary Stevenson. All we want is to get negotiations started." (Tr. 585–588.)

In response to this testimony, the General Counsel called Ipock, who denied that he made any such statement. In fact, he testified that he said the opposite; that "if you just put Gary Stevenson back to work, this would be all over." (Tr. 730, 736.) However, in response to Ipock's denial, the Respondents presented handwritten notes of the conversation that Davidson testified he made later that morning (Tr. 743). In relevant part, the notes stated:

> I pulled into work and went back to where the employees were gathered to talk to them. I informed the employees that we intended to operate our business every day and we would be hiring replacement drivers. Anyone who did not want to work would have to leave the property. Jeff Ipock said you can replace us during a ULP strike and said "Jeff you know what this is about, there is none of us that would back up Gary Stevenson. This is just to get negotiations started and get a contract. (R. Exh. 19.)[36]

So, what should be made of this? On the one hand, it is uncontroverted that Mooney and other named employees were present and would have heard Ipock's comment (Tr. 737–738). Further, neither he nor any of the others were called or specifically asked by the General Counsel or Union whether they heard Ipock make a comment to Davidson.[37] As fellow strikers, they were not mere "bystanders," whose testimony normally cannot reasonably be presumed to favor one side or the other (*Torbitt & Castleman, Inc*., 320 NLRB 907, 910 fn. 6 (1996), affd. on point 123 F.3d 899, 907 (6th Cir. 1997)). Thus, not only may the failure to call them be weighed in evaluating credibility (*C & S Distributors*, 321 NLRB 404 fn. 2 (1996)), but an adverse inference may be taken in the absence of any explanation (*Daikichi Corp*., 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003) (unpub.)). No explanation has been offered here. Thus, I conclude that, if they had been called or specifically asked to testify about the comment, the other strikers would not have corroborated Ipock's testimony.

On the other hand, "what form the contradiction or admission would have taken is, of course, speculative." *Advocate South Suburban Hosp. v. NLRB,* 468 F.3d 1038, 1048 (7th Cir. 2006). Further, it is highly doubtful that their testimony would have supported Davidson's version, which is entirely unbelievable. As noted by the General Counsel, it makes no sense that Ipock (or any reasonable striker) would say that the company cannot permanently replace the employees if they are engaged in a ULP strike, and in the next breath admit that the employees are not engaged in a ULP strike.[38]

Moreover, there are ample reasons to question Davidson's own credibility. For example, Davidson testified that he did not even know the difference between an economic and a ULP strike at the time of his August 3 conversation with Ipock (Tr. 743). However, the previous, May 19 "strike information" memo (R. Exh. 10), which he admittedly co-authored with Spurlino and personally read and distributed to employees, specifically described the legal ramifications of an "economic" strike.[39] Davidson also testified that the sole difference between the parties at the last, August 2009 bargaining session was the $1000 signing bonus proposed by the Union (Tr. 619). However, this is directly contrary to what he told the unit employees in the May 21, 2010 memo that he admittedly co-authored with Spurlino and distributed to employees. See part II.B, supra. See also fn. 14, supra.

I therefore do not infer that the other strikers would have corroborated Davidson's version of Ipock's comment. See *Daikichi Corp*., 335 NLRB at 623 (judge may properly consider all the circumstances in evaluating whether non-testifying

[36] Presumably, the word "can" in the fourth sentence is a clerical error, and Davidson meant to write "can't" or "cannot." I also presume that both the fourth and fifth sentences were meant to be entirely in quotes, notwithstanding the absence of any closing quotation marks on the copy Respondents placed in evidence.

[37] Mooney and another General Counsel witness, Poindexter, did testify to some extent about the morning of the strike. But, neither was specifically asked if he heard Ipock make a comment to Davidson, and neither otherwise provided any testimony probative of the issue in describing the events of that morning. (See Tr. 212, 253.)

[38] It is also noteworthy that there is no clear record evidence that Ipock even attended the earlier, May 2010 union meeting or participated in the strike vote. Thus, it is questionable whether his statements about the employees' reasons for voting to strike at that meeting should carry any weight at all.

[39] The Respondents' posthearing brief (p. 10) appears to concede, consistent with employee Ipock's testimony (Tr. 730), that Davidson again referred to the walkout as an "economic strike" during his discussion with Ipock.

witnesses who may reasonably be assumed to favor one party would have corroborated the testimony of the opposing party's witnesses). This, of course, leaves no version to credit, which may be closest to the truth, i.e. Ipock's comment may not have remotely resembled either version or occurred at all. In any event, I conclude that, whatever Ipock may have said to Davidson in the parking lot, it would not outweigh all of the other objective and subjective evidence cited above that the strike was caused, at least in part, by the Respondents' unfair labor practices.

Finally, the Respondents also cite Ipock's testimony at the hearing that he "was not concerned about going on strike for [Stevenson]" (Tr. 738). The Respondents suggest that Ipock meant he did not strike for Stevenson. However, Ipock explained that, by "not concerned," he meant he had "no qualms about going on strike for that reason" (Tr. 739). Thus, the Respondents' suggestion is clearly without merit.

Employee Poindexter's statements. Employee Poindexter admitted at the hearing that he told an SMI employee (Dexter)—who normally worked as SMI's sales representative but had crossed the picket line at one of the Company's jobsites—that he was "messing with my livelihood" (Tr. 261). Poindexter also admitted that he was upset about the failure to get a contract at the time of the strike (264–265). The Respondents cite these admissions as evidence that the strikers had an economic motive.

However, while only some strikes may have an economic motive, all strikes have an economic impact on the strikers: the strikers do not get paid while they are on strike. And if other employees cross the picket line and continue to work, the strike, and therefore the impact on the strikers' "livelihood," may be prolonged.

Further, even if Poindexter's admissions do betray an economic motive for the strike, this does not mean that the employees were not also motivated by the Respondents' unremedied unfair labor practices. Indeed, as indicated above, Poindexter also testified that he was upset about what the Company had done to Stevenson. I credit Poindexter's testimony in this regard as it is consistent with the weight of the objective evidence and his overall testimony and demeanor betrayed no substantial reason to discredit it.

Employee Mooney's statements. Finally, the Respondents cite statements that Mooney made in a September 8, 2010 letter that he admittedly sent to the International Union seeking help in getting the employees' jobs back (R. Exh. 14). Specifically, the Respondents cite Mooney's statements that:

> Jim [Cahill] thought we could strike this job, also picket at the plant and picket some small jobs and put the pressure on Spurlino Materials to go to the negotiation table;
>
> We haven't had no pay raises or vacations and other things since Spurlino bought out American Concrete. Spurlino doesn't negotiate on fair terms. We thought if we strike for unfair labor practices put a little pressure on them to get to the negotiation table then we can discuss other issues too; [and]
>
> On August 8, 2010, we all agree we did all we could on hurting Spurlino with the jobs, even though we still couldn't get Spurlino to the negotiation table.

On their face, these statements lend support to the Respondents' position. However, the letter, which is six handwritten pages long, also contains several other statements that support the contrary position. For example, it states that

> It has been an ongoing battle since [the representation election] with negotiations and unfair labor practices;
>
> We went on strike for unfair labor practices for the firing of Gary Stevenson and other issues that we won with the National Labor [Relations] Board. Over the last four years we won a lot of issues with the NL[R]B but Spurlino would appeal it then it went to the Federal NL[R]B. We still won and they appeal it again and now its in Washington, D.C. NL[R]B where we're waiting for the results; [and]
>
> Spurlino said we strike for economic[] reasons which is untrue but that's what they said to the NL[R]B.

Further, when asked to explain his letter at the hearing, Mooney testified that he was "frustrated in general over everything that happened . . . not just the contract." He testified that the employees "always hoped that if they went on strike for unfair labor practices and getting Gary's job back, that after all that was over, maybe that we could get back to the negotiation table." (Tr. 223, 227.) Like Poindexter's testimony, I credit Mooney's testimony in this regard as it is consistent with the weight of the objective evidence and his overall testimony and demeanor betrayed no substantial reason to discredit it.[40]

In sum, after carefully considering all the evidence, I conclude that the employees struck at least in part over the Respondent's unlawful discharge and failure to reinstate Stevenson. In agreement with the General Counsel, therefore, I find that the strike was a ULP strike under extant Board and court precedent.[41]

---

[40] The Respondents' posthearing brief (p. 13, fn. 10) questions Mooney's credibility, at least implicitly, on the ground that he denied sending a short comment to the International Union by email the day before he sent his letter (Tr. 217–218). The Respondents submitted into evidence an email from the International to someone else that includes the subject comment (R. Exh. 15). Although the email indicates that the comment was submitted by an "anonymous user," it lists Mooney's name, address, and phone numbers, as well as his wife's email address, under "submitted values." In addition, like the letter, it complains that the employees lost their jobs by "following" Cahill's "lead" and bad "advised" [sic], and incorrectly states that the strike ended on August 9. (Mooney admitted that "dates are not my specialty," Tr. 213.) However, there is no apparent reason why Mooney would falsely deny sending the comment, as it contains nothing that was not said in the letter (which he readily admitted sending). Nor does it contain anything particularly damaging. Accordingly, while it is likely that Mooney (or his wife, based on what Mooney wrote and/or told her) sent the comment, it is also likely that his testimony to the contrary was due to faulty memory (or lack of knowledge of his wife's actions) rather than deliberate untruthfulness.

[41] Some cases indicate that a strike may be found to be economic, even if the employees were motivated in part by the employer's unfair labor practices, if the employer can show that the employees would have struck even if it had not committed unfair labor practices. See *Post Tension of Nevada*, 352 NLRB 1153, 1163 (2008), enfd. 331 Fed. Appx. 3 (D.C. Cir. 2009) (unpub.), citing *Larand Leisurelies v. NLRB*, 523 F.2d 814, 820 (6th cir. 1975). But see, to the contrary, *Decker*

b. Whether the strike was an unprotected partial strike

As noted, the Respondents also argue that they had no obligation to reinstate the strikers because the strike excluded the stadium and convention center project, and was therefore an unprotected partial strike. In support, the Respondents cite the well-established principle that a "strike or stoppage must be complete, that is, the employees must withhold all their services from their employer," *Audubon Health Care Center*, 268 NLRB 135, 137 (1983); they "must *completely stop* working or risk being discharged for engaging in an unprotected activity," *Vencare Ancillary Services*, 352 F.3d 318, 325 (6th Cir. 2003).

However, the cases cited by the Respondents applying this principle are clearly distinguishable. In those cases, the employees remained on the premises and unilaterally continued to perform some work, without the employer's agreement or sanction, while refusing to perform other work. Thus, for example, in *Audubon Health Care*, the nurses aides continued to care for patients in their own sections, but refused to do any work in an "open" section. And in *Vencare*, the physical rehabilitation employees refused to see any patients whatsoever, but continued to do filing and paperwork (for which they would have been entitled to pay under the Fair Labor Standards Act). See also *NLRB v. Montgomery Ward & Co*., 157 F.2d 486, 496–497 (8th Cir. 1946) (employees continued to work in the plant, but refused to process certain orders).

Here, in contrast, although the employees made themselves available to work on the stadium and convention center project during the strike, and even initially grieved the Company's failure to call them in for work on that project, they did not unilaterally continue to perform that or any other work. Cf. *Virginia Stage Lines v. NLRB*, 441 F.2d 499, 503 fn. 5 (4th Cir. 1971), cert. denied 92 S.Ct. 105 (1971) (finding company's partial-strike analogy "particularly vulnerable" where the drivers were called to work only when their names reached the top of the list, and voluntarily relinquished that position, performed no work, and dropped to the bottom of the list without pay when they were assigned to the struck charters); and *NLRB v. Deaton Truck Line*, 389 F.2d 163, 168–169 (5th Cir. 1968) (rejecting company's partial-strike argument where the owner-drivers' pay was predicated on the loads they carried, they collected no pay for the relevant period, and they therefore made "only an uncompensated offer . . . to work on other terms").

Moreover, as indicated above, the employees made themselves available and initially demanded work on the stadium and convention center project only because, unlike other projects, it was covered by the no-strike/no-lockout clause in the PLA. The no-strike clause explicitly forbade the employees from engaging in either an economic or an unfair labor practice strike on the project. (See fn. 13, supra.) Thus, the facts and circumstances of this case do not support a finding that the employees were attempting "to set their own terms and conditions of employment in defiance of their employer's authority" by engaging in a partial strike. *Audubon Health Care Center*, 268 NLRB at 136. On the contrary, they indicate that the employees were acting in accordance and compliance with the terms and conditions contained in the PLA, to which both the Company and the Union were signatory.

Finally, if the employees had violated the PLA and refused to perform any work on the stadium and convention center project, they would have thereby lost their protection under the Act just as surely as they would have by violating the legal prohibition on partial strikes. See *Mastro Plastics*, supra (a strike in violation of an express no-strike clause is unprotected). Thus, if adopted, the Respondents' argument for the rote application of the "partial-strike" prohibition in these circumstances would result in a classic "catch 22,"[42] whereby the strike would be unprotected and the employees would lose their protection under the Act regardless of whether they struck the project. In short, the employees would be forced to choose between forfeiting their right to strike or forfeiting their jobs.

Clearly, such a result would be inconsistent with the general statutory policy favoring the right to strike. See *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 234–235 (1963) ("While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant."). See also *Radio Officer's Union v. NLRB*, 347 U.S. 17, 40 (1954) ("The policy of the Act is to insulate employees' jobs from their organizational rights"). Thus, there must be a strong basis, not just in the letter or language of the partial-strike prohibition, but in its underlying purpose, for the Board to endorse such a forfeiture. See generally *NLRB v. Allis-Chalmers Mfg. Co*., 388 U.S. 175, 184 (1967); and *NLRB v. Drivers, Chauffeurs, Helpers, Local 639*, 362 U.S. 274, 284 (1960).

There is no such basis, at least not on the facts here. As the Sixth Circuit stated in *Vencare*, "the underlying rationale of the prohibition on partial strikes is that the employer has the right to know whether or not his employees are striking." 352 F.3d at 324 (citing *Vic Koenig Chevrolet*, 263 NLRB 646, 650 (1982)). See also *Shelly & Anderson Furniture v. NLRB,* 497 F.2d 1200, 1203 (9th Cir. 1974) (such actions "impede the employer from using replacement or temporary employees while the protesting employees continue to draw their wages" and "are unprotected because they make it impractical for the employer to operate his business properly.") There was no ambiguity about the employees' intentions in this case. The employees clearly stated that they were on strike, explained that they would remain available to perform work on the stadium and convention center project only because of their contractual agreement with the Company not to strike that project, and advised the Company that it could contact them by phone for work on that project. There was also no showing that the employees' actions impeded the Company from using replacement or temporary employees, or made it impractical for the Company to operate its cement business. Indeed, as indicated above, the Company continued to deliver concrete from the very first

Coal Co., 301 NLRB 729, 746 (1991), citing *Northern Wire,* 887 F.2d at 1319–1321. In any event, even assuming this is a correct statement of the law, I would find, for the reasons set forth above, that the Respondents failed to make such a showing.

[42] "A dilemma or circumstance from which there is no escape because of mutually conflicting or dependent conditions" (The Concise Oxford Dictionary (1990)); "a 'no-win' situation or 'double bind'" (Wikipedia (2011)).

day of the strike, including to the stadium and convention center project, using temporary Ohio drivers and/or replacements. Further, in doing so, the Company at all times remained in control of the scheduling. Thus, the mere fact that the strikers offered to work at the PLA site did not by itself prevent the Company from operating its business.[43]

Accordingly, for all the foregoing reasons, in agreement with the General Counsel, I find that the strike was a protected unfair labor practice strike. In the absence of any other asserted defenses to the allegations, I therefore find that the Respondents unlawfully refused to reinstate the 12 strikers when they unconditionally offered to return to work effective August 12, 2010.

CONCLUSION OF LAW

By failing and refusing, on August 12, 2010, to immediately reinstate 12 employees who had engaged in an unfair labor practice strike and had made an unconditional offer to return to work, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, consistent with precedent I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall order the Respondents, within 14 days of the Board's Order, to offer the 12 employees who engaged in an unfair labor practice strike in August 2010, and were not immediately reinstated on request, recall to their former positions, terminating, if necessary, any replacements who occupy those positions, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.[44] I shall also order the Respondents to make whole the unfair labor practice strikers who were denied reinstatement for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, I shall order the Respondents to expunge from their files any reference to the failure to reinstate the strikers, and to notify them in writing that this has been done. Finally, I shall order the Respondents to post a notice to all employees in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

Accordingly, on these findings of fact and conclusions of law and on the entire record, I issue the following recommended[45]

ORDER

The Respondents, Spurlino Materials, LLC, and Spurlino Materials of Indianapolis, LLC (a single employer), Indianapolis, Indiana, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to immediately reinstate employees who engage in an unfair labor practice strike, upon their unconditional offer to return to work.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, offer the 12 employees who engaged in an unfair labor practice strike in August 2010, and were not immediately reinstated on request, recall to their former positions, terminating, if necessary, any replacements who occupy those positions, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the unfair labor practice strikers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, remove from their files any reference to the unlawful failure to reinstate the strikers, and within 3 days thereafter notify them in writing that this has been done and that the failure to reinstate them will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at their facilities in and around Indianapolis, Indiana, copies of the

[43] As indicated above, SMI schedules the first loads of the day by seniority, and assigns subsequent loads by first back in, first back out. However, it is quite common, even in normal circumstances, for SMI to modify its daily schedule due to delays, customer changes, and other unforeseen exigencies, and to at least sometimes call in previously unscheduled employees to handle extra loads (Tr. 632–633, 638, 681–682). Indeed, the dispatch sheet specifically lists the home and/or cell phone number for every driver (R. Exh. 12). (Although employee Mooney testified that he could not remember ever being called in (Tr. 247), he is second in seniority and would normally be scheduled for the first loads of the day.) There seems little question, however, that calling the strikers in for PLA work only would have been inconsistent with the usual dispatch procedure. In any event, I need not, and do not, decide in this case whether SMI violated the PLA by failing to do so. Nothing in this decision prevents the Company from arguing, in any subsequent proceeding that may arise relating to the Union's grievance, that, in Davidson's words, it would have been "pretty impossible" to call strikers in for PLA work only (Tr. 591–593).

[44] The General Counsel's posthearing brief requests that all 14 of the employees named in the complaint be ordered reinstated with backpay. However, as indicated in the Union's posthearing brief, the order should properly require reinstatement and backpay for only 12 of the named employees. See fn. 16, supra.

[45] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

attached notice marked "Appendix."[46] Copies of the notice, on forms provided by the Region, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since August 12, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to immediately reinstate employees who engage in an unfair labor practice strike, upon their unconditional offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer the 12 employees who engaged in an unfair labor practice strike in August 2010, and were not reinstated on request, recall to their former positions, terminating, if necessary, any replacements who occupy those positions, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole the 12 unfair labor practice strikers who were denied reinstatement for any loss of earnings and other benefits suffered as a result of our discrimination against them, with interest compounded daily.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful failure to reinstate the strikers, and within 3 days thereafter notify them in writing that this has been done and that our failure to reinstate them will not be used against them in any way.

SPURLINO MATERIALS, LLC

[46] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."